IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 10TH JULY 2007 / 19TH ASHADHA 1929

CRL.A.No. 748 of 2007()

SC.806/2004 ON THE FILE OF THE COURT OF SESSION, KASARAGOD DIVISION AT HOSDRUG

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APPELLANT:

P.ANDRUMAN, S/O.MAMMED, AGE 56/02,
PAZHAYAPATTILLATH HOUSE,
NELLIMALA, KONNAKKAD, MALOM VILLAGE,
KASARAGOD.
C.NO.4456, CENTRAL JAIL, KANNUR.

BY ADV. INNOCENT FRANCIS PAPPALI[STATE BRIEF]

RESPONDENTS:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERRNAKULAM.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.Thankappan, J.

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Crl. A. No. 748 of 2007

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Dated this the 10th day of July, 2007

JUDGMENT

Appellant, accused in S.C. No.806/2004 on the file of the Court of Session, Kasaragod Division at Hosdurg, faced trial for offence punishable under section 55(g) of the the Abkari Act on the allegation that he was found in possession of 55 litres of wash for the purpose of illegal distillation of arrack and the same was stored adjacent to the house of the appellant at the place called Nellimala in Malom Village. To prove the charge against the appellant, the prosecution examined PWs.1 to 6 and produced Exts.P1 to P7. MOs.1 to 3 were also produced on the side of the prosecution. After closing the evidence, the appellant was questioned under section 313 of Cr.P.C. He denied the allegation and stated that he was innocent and the case was foisted against him by the police. On the side of the defence, DW1 was examined and Exts.D1 to D1(c) were marked. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55(g)of the the Abkari Act and he was convicted thereunder and sentenced to undergo simple imprisonment for four years and to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment for nine

months. The conviction and sentence awarded against the appellant are assailed in this appeal.

2. Since the appeal has been filed through the jail authorities and no counsel has been engaged to defend the case of the appellant, this Court appointed a member of State Brief panel to defend the case of the appellant.

3. Learned counsel for the appellant submits that the trial court has committed serious error in relying on the evidence of PW1 and PW5, the official witnesses, as the independent witness were turned hostile to the prosecution. The learned counsel further submits that even in accepting the evidence of PW1 and PW5 it can be seen that the prosecution failed to prove that the appellant was in possession of contraband article for the purpose of distillation or preparation of arrack, as there is no evidence to support the above charge against the appellant. To substantiate the case of the appellant, the learned counsel relies on a decision of this Court reported in Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631).

4. The prosecution case is that on 2-5-2002 at 4 P.M. the appellant was found in possession of 55 litres of wash for the purpose of illegal distillation of arrack and was stored the same adjacent to the house

of the appellant at place called Nellimala in Malom Village. The further case of the appellant is that the appellant was arrested from the scene of occurrence on 2-5-2002 itself and MO1 and MO2 were seized as per Ext.P1 mahazar prepared in the presence of independent witnesses. It is stated that the appellant was produced before the court on 3-5-2002. As per Ext.P4 chemical analysis report, the samples contained 11.77% of ethyle alcohol by volume and the sample is wash.

5. The first contention of the learned counsel that the trial court has committed serious error in relying on the evidence of PW1 and PW5 official witnesses as the independent witness were turned hostile to the prosecution. There is no rule that the evidence of official witness cannot be relied on to prove the case, if the other circumstances are also proved in favour of the prosecution. Though PW2, independent witness, turned hostile to the prosecution, he admitted his signature in Ext.P1 seizure mahazar. In the circumstances, the evidence of PW1 and PW5 is rightly accepted by the trial court to prove that the appellant was found in possession of 55 litres of wash.

6. Question to be considered in this appeal is whether the conviction entered by the trial court under section 55(g) of the the Abkari Act is sustainable or not ?

6. The prosecution case is that the appellant was found in possession of 55 litres of wash for the purpose of illegal distillation of arrack and the same was stored adjacent to the house of the appellant. Section 55(g) of the the Abkari Act reads as follows:-

> **(g) uses, keeps or has in his possession any materials, still, untensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug"**

A reading of the above section would show that the prosecution must allege and prove that materials were kept for the purpose of manufacturing liquor. In this context, there is no evidence to show that materials were kept for the purpose of manufacturing liquor. Either PW1 or PW5 had not stated before the court that they had seen any materials or utensil for the purpose of distillation of arrack. In the above circumstances, this Court is of the view that the finding of the trial court that the appellant had committed an offence under section 55(a) of the Act is not sustainable. In this context, a decision reported in Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631) is relevant. In the above decision this Court held that to attract an offence under section 55(a) of the the Abkari Act, the prosecution must allege and prove that possession of the

contraband liquor was incidental or in connection with export, import, transport or transit of liquor. Looking into the above angle, for applying section 55(g) of the Abkari Act, it has to be pleaded and established that materials were kept for the purpose of manufacturing liquor. Therefore, the finding of the trial court that the appellant found guilty under section 55(g) of the Abkari Act is not legally sustainable.

7. In the above circumstances, the conviction and sentence awarded against the appellant/accused in S.C.No.806/2004 on the file of the Court of Session, Kasaragod Division, Hosdurg are set aside and the appellant is acquitted. Therefore, the appellant shall be released forthwith unless required in any other case.

The appeal is allowed as above.

K. Thankappan,
Judge.

K. Thankappan,J.

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Judgment

10-7-2007